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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 RUBEN LIMON,

12 Plaintiff,

13 vs.

14 CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

15 Defendant.  
16

CASE NO. CV 13-07425 RZ

MEMORANDUM OPINION  
AND ORDER

17 Plaintiff Ruben Limon challenges the Administrative Law Judge's findings  
18 about his credibility as a witness, the impact of his obesity and the determination that he  
19 did not have a severe impairment relating to his back.

20 The Administrative Law Judge found that Plaintiff had the severe impairments  
21 of carpal tunnel syndrome and obesity. [AR 23] He also found that, although Plaintiff  
22 could not perform his past relevant work, he still retained the capacity to perform other  
23 jobs, including the jobs of counter clerk and conveyor belt bakery worker. [AR 24-28] In  
24 making this determination, he included the Commissioner's formulaic statement that  
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26 After careful consideration of the evidence, I find that the  
27 claimant's medically determinable impairments could  
28 reasonably be expected to cause the alleged symptoms; however,

1 the claimant's statements concerning the intensity, persistence  
2 and limiting effects of these symptoms are not credible to the  
3 extent they are inconsistent with the above residual functional  
4 capacity assessment.

5  
6 [AR 26] He then followed with three reasons that presumably were meant to amplify this  
7 boiler-plate.

8 The Commissioner's use of this language does not comport with the rulings  
9 of the Ninth Circuit. That Court has ruled that, unless the claimant is malingering, the  
10 Administrative Law Judge cannot reject the claimant's testimony as to his subjective  
11 symptoms unless he gives clear and convincing reasons for doing so. *Lester v. Chater*, 81  
12 F.3d 821, 834 (9th Cir. 1996). And those reasons are not given in a vacuum, untethered  
13 to any evidence; "rather, the ALJ must identify what testimony is not credible and what  
14 evidence undermines the claimant's complaints." *Id.*, citing *Dodrill v. Shalala*, 12 F.3d  
15 915, 918 (9th Cir. 1993), and *Varney v. Secretary of Health and Human Services*, 846 F.2d  
16 581, 584 (9th Cir. 1988). Here, the Administrative Law Judge sought to fulfill the second  
17 part of this proposition — identifying what evidence undermines the claimant's complaints  
18 — but not the first: he did not identify what testimony was not credible. He only referred  
19 in general to "statements concerning the intensity, persistence and limiting effects of these  
20 [unspecified] symptoms." He thus violated the rulings of the Ninth Circuit.

21 Although he did not specify the testimony that was not credible, he did attempt  
22 to satisfy the other portion of the requirement, identifying the evidence that he thought  
23 undermined those statements, whatever they may have been. Assuming that he had  
24 identified the statements that he found not credible, the Court's task would be to assess  
25 those reasons and determine if they are "clear and convincing," a standard that "is the most  
26 demanding in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.  
27 2014), quoting *Moore v. Commissioner of Social Security Administration*, 278 F.3d 920,  
28 924 (9th Cir. 2002).

1           The first reason he gave was that Plaintiff's testimony as to his activities of  
2     daily living were inconsistent.

3           One supposed inconsistency was that Plaintiff stated that he performed few  
4     if any chores, but he also said that he lived alone and did not report any particular help in  
5     maintaining the residence. The Administrative Law Judge thought it was inconsistent to  
6     live alone and in his own apartment and not perform any chores. [AR 26] But Plaintiff did  
7     not live alone; he lived in his sister's house, in a separate area in the back, and the sister  
8     and her girl friend did the cooking and like tasks. [AR 38-39, 65]

9           The Administrative Law Judge also noted that Plaintiff had testified that he  
10    could button his own shirt, eat independently, and bathe himself, and that "[t]hese activities  
11    would require some use of the claimant's hands, particularly his right dominate [sic] hand."  
12    [AR 26] It is not clear to the Court how these statements are thought to be inconsistent;  
13    perhaps it is because the Administrative Law Judge earlier had referenced a statement by  
14    Plaintiff that he was unable to use his hand to pick up anything. [*Id.*, citing Exhibit 4E,  
15    page 2] If so, this would be a clear mis-reading of the evidence. In the cited exhibit,  
16    Plaintiff said "I can't lift nothing because my right hand just had surgery." [AR 179] That  
17    exhibit was dated August 28, 2011, but the testimony that he could button his shirt came  
18    almost a year later, on June 25, 2012, not just after he had had surgery. [AR 62] That is  
19    not an inconsistency.

20          Last, the Administrative Law Judge wrote that Plaintiff said he could lift no  
21    more than three pounds, but then testified that he could lift a gallon of milk, which is eight  
22    pounds. [AR 26] Here too the Administrative Law Judge has not stated the evidence  
23    fairly. At the hearing, the Administrative Law Judge first asked Plaintiff how much weight  
24    he could lift, and Plaintiff responded "One to two pounds, three pounds at the most I would  
25    say. I haven't lifted three pounds." [AR 59] Then, the Administrative Law Judge asked  
26    Plaintiff if he could lift a gallon of milk, to which Plaintiff responded "Yes, I can." [*Id.*]  
27    In a "gotcha" moment, the Administrative Law Judge then said "Well, that's about eight  
28    pounds." [*Id.*] Plaintiff went on to explain that he could lift a gallon with his left hand, but

1 not his right. It is clear from the context of the questions and answers that these were all  
2 estimates; indeed, the weight of a gallon itself obviously was an estimate, as nobody  
3 testified to its weight. One could not fairly call this an inconsistency that would impeach  
4 Plaintiff's credibility; certainly, one could not do so under the clear and convincing  
5 standard.

6 The second reason the Administrative Law Judge gave for disbelieving  
7 Plaintiff was that Plaintiff's motives for seeking disability benefits were questionable. This  
8 was so, the Administrative Law Judge concluded, because Plaintiff's alleged onset date  
9 appeared to coincide closely with the termination of the unemployment benefits he received  
10 following the loss of his job. [AR 26] Factually, this is incorrect. Plaintiff stopped  
11 receiving unemployment benefits approximately a year before his claimed date of onset,  
12 and approximately two years before he applied for Social Security disability. [AR 48, 136,  
13 21] This reason, too, does not satisfy the clear and convincing standard.

14 The third and final reason the Administrative Law Judge gave was that  
15 Plaintiff's treatment was essentially routine and conservative in nature. [AR 27] He  
16 seemed to acknowledge, however, that surgery on Plaintiff's hands was not routine, but put  
17 it to one side because it was successful. [*Id.*] So the "essentially routine and conservative"  
18 treatment addressed Plaintiff's back and shoulder impairments. This may be a valid  
19 consideration for assessing whether Plaintiff had a severe impairment to his back and  
20 shoulders, and it might impeach Plaintiff insofar as the testimony the Administrative Law  
21 Judge was addressing had to do with complaints about Plaintiff's back and shoulders —  
22 as noted, the Administrative Law Judge did not specify the testimony that he thought was  
23 not credible — but the Court does not find it a clear and convincing reason for impeaching  
24 Plaintiff's complaints about his hands, the area in which the Administrative Law Judge  
25 found Plaintiff to have severe impairments.

26 In short, the Administrative Law Judge did not comport with Ninth Circuit law  
27 about subjective symptoms in two ways. He did not identify the testimony about such  
28 symptoms that he found not to be credible. And he did not offer clear and convincing

1 reasons for disbelieving any testimony, even had he specified the testimony about the  
2 symptoms that he found not to be credible.

3 Other than challenging the Administrative Law Judge's credibility  
4 determinations, Plaintiff makes two other arguments here. First, he asserts that the  
5 Administrative Law Judge did not address his obesity. The Court agrees. The  
6 Administrative Law Judge stated that Plaintiff's obesity was a severe impairment [AR 23]  
7 and stated that he had applied an internal Social Security Ruling disclosing that the  
8 Administration will make an individualized assessment of the impact of obesity on an  
9 individual's functioning when deciding whether the impairment is severe, and that the  
10 Administrative Law Judge had done so here. [AR 26] But the decision contains no other  
11 discussion of the impact of Plaintiff's obesity. On remand, the Administrative Law Judge  
12 must evaluate and decide the impact of this severe impairment.

13 Finally, Plaintiff asserts that the Administrative Law Judge erred in failing to  
14 consider Plaintiff's lumbar spine impairment as severe. Severity is, as Plaintiff says, a  
15 *de minimis* screening device, *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988); *Smolen*  
16 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), but whether a person has a severe  
17 impairment is a question of functionability. 20 C.F.R. §§ 404.1521, 416.921. Since the  
18 matter must be remanded, the Commissioner may wish to evaluate further Plaintiff's  
19 assertions about his lumbar spine.

20 The decision of the Commissioner is reversed, and the matter is remanded for  
21 further proceedings consistent with this opinion.

22 IT IS SO ORDERED.

23  
24 DATED: October 10, 2014

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26   
27 RALPH ZAREFSKY  
28 UNITED STATES MAGISTRATE JUDGE